

**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

NO.

78-1001

CARL D. WEST, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

and

ANDREW J. DAIGLE, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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Petitioners, Carl D. West and Andrew J. Daigle, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 26, 1978, and the rehearing denial entered on July 28, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit, printed in Appendix A, (pp. A-1 - 26) herein, is reported as *West vs. Harris* at 573 F 2d 873. There was no reported opinion of the district court below. The jury verdicts, pertinent rulings and opinions of the United States District Court for the Western District of Louisiana, and notices of appeal are reproduced in Appendix D, (pp. A-55-8, 64-8), Appendix E, (pp. A-100-1, 103-5) and Appendix G, (pp. A-120-132), herein from the Appendix prepared by the trial court for the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 26, 1978. (*West*, supra, p. 873, Appendix A, p. A-1) A petition for rehearing was denied on July 28, 1978. (Appendix G, pp. A-133-4) Petitioners *West & Daigle*, filed an application for extension of time in which to file for a Writ of Certiorari in the Supreme Court of the United States. Mr. Justice Powell, on October 11, 1978, signed the order extending the time for filing the petition for writ of certiorari to, and including, December 20, 1978. (Appendix G, p. A-135). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the United States Court of Appeals for the Fifth Circuit has usurped the function of the jury as finders of fact in these cases?

(2) Whether the United States Court of Appeals for the

Fifth Circuit decision in these cases is totally contrary to the congressional intent and national purpose of the National Flood Insurance Act, as well as contrary to the personal intent and purpose of the contracting policy holders?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved in these consolidated cases is the Seventh Amendment to the United States Constitution. (p. 10) The statutory provisions involved are Sections 1302 and 1305 of the National Flood Insurance Act of 1968, (42 U.S.C.A. §§ 4001(f), 4012(a), Appendix B, pp. A-27-32) and the applicable Federal Regulations are 24 CFR §1909.1, ("Flood or Flooding" and "Mudslide") and 24 CFR § 1911.4, (Appendix C, pp. A-33-5)

STATEMENT OF THE CASES

A. *The Daigle Case*

In 1966, the Daigles purchased a new home in Morgan City, which is located in south central Louisiana near the Atchafalaya river. (Appendix D, pp. A-36, 44-5). Subsequently, they purchased a National Flood Insurance policy on their home with policy limits of \$17,500 and a policy term of March 31, 1973, to March 31, 1974. (*West*, supra, p. 876; Appendix A, p. A-8; Appendix D, p. A-39, Appendix F, p. A-116). On April 17 and 18, 1973, a 12 to 14 inch rain fell in the Morgan City area creating flooding conditions in the entire area and on the Daigles' property. (Appendix D, pp. A-36-50) Structural cracking of their home was first heard on April 18, 1973, and the observable cracks continued to

worsen with time. (Appendix D, pp. A-40,51) Because of the emergency flooding situation, the municipal authorities pumped out the drainage canals in and around the Morgan City area. After the deluge a dry period followed through August, 1973. (*West*, supra, p. 877; Appendix A, p. A-9; Appendix D, pp. A-45, 48). The Daigles had never heard or observed any cracking or other structural damage to their home for the seven years prior to the flood. (Appendix D, pp. A-36-7, 40, 52-3). Dr. Capozzoli, defendant's soil expert, opined that the flood had little, if no effect, on the resulting structural damage. He also concluded that the pumping out of the drainage canals or the subsequent dry period was not the cause of the damage. He contended that the nature of the soil support caused uneven settlement under the home's concrete slab over the years which ultimately resulted in the cracking damage. (Appendix D, pp. A-57-62). However, he did admit that if no cracks were found prior to the flood and cracks appeared after the flood, he would agree that the flood was the cause of the structural damage. (Appendix D, p. A-63). Mr. Shumaker, a construction contractor who inspected the house in July, 1973, and who ultimately repaired the Daigles' home, confirmed that the cracking of the masonry and brick had occurred only a few months earlier. (Appendix D, p. A-51). Mr. Guillory, an architectural engineer, observed that the Daigles' home was of typical construction for the soil conditions in the Morgan City area and the slab used was sufficient to support those light, brick veneer type homes. Because there was no appreciable settlement of the Daigles' home as evidenced by lack of cracking, he concluded that the flood directly caused the structural damage. (Appendix D, pp. A-51-5).

The jury concluded that the structural damage to the

Daigles' home was a "direct loss by flood" and awarded \$12,084.56 in damages. (The award was later reduced by the policy deductible of \$200.00) (Appendix D, pp. A-67-8). "Flood" was defined in the policy as a "general or temporary condition of partial or complete inundation of normally dry land areas from (1) the overflow of inland or tidal waters, (2) the unusual and rapid accumulation or runoff of surface waters from any source, or (3) mudslides which are caused or precipitated by accumulation of water on or under the ground." (*West*, supra p. 876, Appendix A, p. A-7); Appendix F, p. A-108). The trial judge denied defendant's motion for a directed verdict at the close of plaintiff's evidence (Appendix D, pp. A-55-8) and after all evidence was presented. (Appendix D, pp. A-64-7) Included as grounds for defendant's motions were that the evidence failed to show a direct loss by flood and the evidence established certain excluded perils under the policy, namely:

"Perils Excluded - This Company shall not be liable for loss: (a) by . . . (3) water, moisture, or mudslide damage of any kind resulting primarily from conditions, causes or occurrences which are solely related to the described premises or are within the control of the insured (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment, seepage or backup of water, or hydrostatic pressure) or any condition which causes flooding which is substantially confined to the described premises or properties immediately adjacent thereto;

.

(d) by fire, windstorm, explosion, erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the peril of flood, or by theft;"

.....

(*West*, supra, p. 876, Appendix A, p. A-7-8, Appendix F, p. A-108).

After the verdict, the defendant again urged the aforementioned grounds in motions for judgment notwithstanding the verdict and for a new trial. Defendant's motions were denied. (Appendix G, pp. A-120-31). On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment in favor of the Daigles and directed a verdict for the defendant by concluding that while there was sufficient evidence for the jury to find there was a direct loss by flood, the facts showed the immediate cause of the Daigles' loss was an earth movement which was not a mudslide. The Court said the policy did not cover earth movement in the form of soil settlement regardless of the role the flood played in causing that earth movement. (*West*, supra, pp. 876-78, Appendix A, pp. 8-12).

B. The West Case

The Wests purchased a four year old home located on an incline in the Bayou Vista subdivision near Morgan City in 1969 on a VA approved loan. (Appendix E, pp. A-70, 78-80) They purchased flood insurance in the amount of \$17,500 with a policy term of April 16, 1973, to April 16, 1974. (*West*, supra, p. 876, Appendix A, p. A-8 ; Appendix F, p.

A-117). At the time the Wests acquired their home they carefully inspected the home and found no structural defects, and they had not seen any evidence of cracking or structural damage for the four years prior to the 1973 flood, despite numerous wet and dry periods, minor flooding, and even a hurricane. (Appendix E, pp. A 72-5, 79-87).

The deluge of April 17 and 18, 1973, flooded the entire area including the area around the Wests' house. The water was waist deep in the street in front of the Wests' house and entered the Wests' house to a depth of one to two inches and remained standing there for a period of over 18 hours. (Appendix E, pp. A 69-71, 73, 77). Water damage to the floor tiles, walls, baseboards, and insulation and outside air conditioning unit was seen immediately. Structural damage was observable within two or three weeks after the flood, when a sliding glass door would not open, bricks began to separate from baseboards, a ridge appeared under the floor tiles and later an open crack developed where the ridge had been. (Appendix E, pp. A 73-7, 80-1).

Mr. Patterson, a Morgan City construction contractor, found the slab had cracked in several places and he opined the only feasible method of repair was to demolish the structure and rebuild a similar house. (Appendix E, pp. A-88-9). He testified that the house was adequately constructed for that area and met the standards for FHA and VA approval. (Appendix E, pp. A-90-1, 94) He said he would rebuild the house the same way as it had been built before (Appendix E, p. A-91), however he did state he might use a slightly larger slab because if the slab failed again because of flood he might be involved in the law suit. (Appendix E, pp. 98-9). Mr. Patterson clearly said the sudden structural damage was due

to area flooding. (Appendix E, p. A-90).

Dr. Capozzoli again testified that the flood had a negligible effect on the house, and that the structural damage was in progress at the time of flood and was due to the soil conditions and improper construction of the house. (Appendix E, p. A- 101). He stated that the flood waters could have accelerated the settling of the soil under the house, but he could offer no explanation as why sudden cracking would occur immediately after the flood except to conclude that there was cracking in progress at the time of flood and the cracking was not observed by the Wests or others. (Appendix E, pp. A-102-3).

After hearing all the evidence the jury awarded the Wests the policy maximum of \$17,500 for "direct loss by flood" (See Appendix E, pp. A 104-5). Defendant's motions for a directed verdict, at the completion of plaintiff's evidence, (Appendix E, pp. A-100-1), and after all the evidence, were denied (Appendix E, pp. A- 103-4). Also, defendant's motions for judgment notwithstanding the verdict and for a new trial were based on the same grounds as in the Daigles' case. These motions were similarly denied by the trial judge. (Appendix G, pp. A-120-31).

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the jury award and remanded the case for trial on the amount of damages (less the \$200 policy deductible) caused by flood waters which entered the house. As in the Daigle Case, the Court concluded that the structural damage to the Wests' home was caused by earth movement other than mudslide. (*West*, supra, p. 878-79, Appendix A, pp. A- 12-15). Since the defendant insurer in the West Case

had some liability, the Court then decided the issues raised on cross-appeal, namely the applicability of Louisiana's statutory law on attorney's fees and the appropriateness of prejudgment interest. Attorney's fees and penalties allowed under Louisiana law were found inapplicable; prejudgment interest was allowed. (*West*, supra, pp. 878-84, Appendix A, pp. A- 15-26). Petitioners', West & Daigle, do not seek review of the Court's findings on those cross-appeal issues.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States Court of Appeals for the Fifth Circuit has violated the tenets of the Seventh Amendment to the United States Constitution by precluding the fact finding function of the jury in the West & Daigle cases. The Court of Appeals decision conflicts with rulings of the Supreme Court of the United States and other Circuit Courts of Appeals decisions.

Further, the Court of Appeals for the Fifth Circuit's narrow interpretation of the earth movement flood policy exclusion is unworkable, unconscionable and is directly contrary to the intent of the contracting policyholders, and to intent of the Congress which implemented a National Flood Insurance Program to protect American homeowners from the perils of flood.

Finally, that Court's interpretation of an insurance policy conflicts with decisions announced by the Supreme Court of the United States and other Circuit Courts of Appeals rulings.

A. Issue: Seventh Amendment Violation

The Court of Appeals for the Fifth Circuit is not free to

reexamine the jury's findings of fact in these cases; to do so violates the Seventh Amendment to the United States Constitution as stated:

"In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S.C.A., Const. Amend. 7)

In the Daigle case, the Court of Appeals for the Fifth Circuit agreed that the evidence presented supported the jury's verdict that the flood caused the structural damage, but that Court presumes that the evidence showed how the flood caused the damage:

"This testimony was sufficient to support the jury's finding that the crack damage was a direct loss by flood. However, the plaintiff's proof also established *how* the flood caused this damage, and that proof brings into effect the policy's earth movement exclusion," (*West*, supra, p. 876, Appendix A, p. A-9).

The Court of Appeals for the Fifth Circuit came to a conclusion which is contrary to the factual evidence presented and the inferences to be drawn therefrom. The Court said:

". . . The house sank because the earth below it shifted and settled as a result of the loss of moisture in the soil. Regardless of whether this settlement had been in progress over a long period of

time or whether it occurred immediately after the flood and draining of the canals, it was still the result of earth movement . . . The policy does not cover loss caused by earth movement in the form of soil settlement. It unambiguously provides the *only* earth movement covered is a mudslide caused or precipitated by accumulation of water on or under the ground. There is no evidence of a mudslide in this record, nor is there evidence that the general surface of the ground area was unlevel . . ." (*West*, supra, p. 877, Appendix A, p. A-11).

Mrs. Daigle testified the rain stopped on the morning of April 18, 1973, (Appendix D, p. A-47) and she heard crackling sounds and noticed cracks almost immediately after the rain throughout the day of April 18th, (Appendix D, p. A-40) before the water had receded in the late afternoon of the 18th. (Appendix D, pp. A-48). The canals had been previously pumped out several times after heavy rains with no damage (Appendix D, pp. A-48-9) and defendant's expert, Dr. Capozzoli, testified that the pumping out of the canals would have no effect on the house (Appendix D, pp. A-61-2). It was reasonable for the jury to conclude that loss of moisture in the soil was not the initial cause of the damage, but that the heaving and cracking of the house was initially caused by the pressure and force of the flood waters acting on the foundation.

Mr. Guillory, an architectural engineer, who testified on behalf of the Daigles, concluded that the flood waters which floated the house aggravated the heaving and settling of the home. (Appendix D, pp. A-54-5). Because no appreciable settlement of the house had occurred for seven years pre-

viously, as evidenced by the lack of cracking, he concluded that the flood certainly had a direct effect on the structural damage to the house. (Appendix D, pp. A-52-4). Dr. Capozzoli was of the opinion that the house had appreciably settled before the flood and that cracking had occurred but was unnoticed. (Appendix D, pp. A-57, 59-62) He stated the flood had little effect on the resulting damage. However, he did observe that if there were no cracks before the flood and cracks after the flood, the flood was the cause. (Appendix D, pp. A-61-3)

The Court of Appeals for the Fifth Circuit did not believe, as the jury did, that the flood waters not only proximately caused the shifting of the earth below the house which resulted in structural damage, but also that the force and pressure of the flood waters caused the house to heave and crack initially. Once the loss was in progress, the receding flood waters and loss of moisture through evaporation and pumping would cause the structural damage to become more apparent.

Finally, as noted above, the Court of Appeals for the Fifth Circuit precludes the jury from finding that a mudslide had occurred. The Court's finding that there was "no evidence of a mudslide . . . nor is there evidence that the general surface of the ground area was unlevel..." (*West*, supra, p. 877, Appendix A. p. A-11) is *totally erroneous*. Dr. Capozzoli testified that a canal was located eight feet below the Daigles' house, (Appendix D, p. A-57), and Mrs. Daigle clearly testified her house was located at the top of an incline above the street (Appendix D, p. A-46); and that mud and debris were washed into the street in front of her house and her next door neighbor's house on the day after the flood. (Ap-

pendix D, pp. A. 49-50).

The Court of Appeals was bound to view the evidence in a light most favorable to the Daigles when they decided that a directed verdict or a judgment notwithstanding the verdict should have been granted as a matter of law. It is obvious that the Fifth Circuit did not give the Daigles the benefit of all inferences which the evidence supported, even though contrary inferences might be reasonably drawn. The jury weighs the credibility of witness and determines proximate cause. *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231, 24 L Ed 720 (1930); *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L Ed 520 (1944); *Lavender vs. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L Ed 916 (1946); *Wilkerson vs. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L Ed 397 (1949); *Continental Ore Co. vs. Union Carbide and Carbon Corp.*, 370 U. S. 691, 82 S. Ct. 1404, 8 L Ed 2d 777 (1962); *Boeing Company vs. Shipman*, 411 F 2d 365 (5th Cir., 1969); *Garcia vs. Murphy Pac. Marine Salvaging Co.*, 476 F 2d 303 (5th Cir., 1973).

Plaintiffs' witness were clear that the Daigles' home did not crack independently of the flood waters. The jury could have rejected all or part of the expert opinions offered and could have concluded that because the Daigles' home had weathered many storms and wet and dry periods for seven years prior to the flood with no sinking, cracking, or other observable structural damage and that because cracking noises and observable structural damage occurred to the home immediately after the flood, the flood was the immediate cause of the loss.

In the *West* case, it is certain that the Court of Appeals

violated the jury's fact finding function by admitting that the flood water caused the damage and then precluding the jury from determining that the flood waters were the proximate cause of the loss:

" . . . In sum, the slab cracked because changes in the water table due to flooding and drainage of flood waters caused relative earth movements under the slab which created the positive and negative pressure which cracked it . . ." (*West*, p. 878, Appendix A, p. A-14)

The testimony of the Wests' clearly established that despite wet and dry periods, minor flooding, and even hurricanes for almost eight years prior to the flood, no structural damage had occurred to the house (Appendix E, pp. A72-5, 79-87). The Court of Appeals for the Fifth Circuit implied Mr. Patterson testified relative earth movements caused the damage, but that Court admits they did not clearly appreciate Mr. Patterson's testimony as to how the foundation failed. (*West*, supra, p. 878, Appendix A, p. A-13-4). Nowhere has Mr. Patterson said that changes in the water table caused relative earth movements which cracked the slab, nor does he agree with Dr. Capozzoli that lack of soil support caused the foundation to settle unevenly and crack. (Appendix E, pp. A-88-99). He only attributed the structural damage to flooding. (Appendix E, p. 90). Dr. Capozzoli dismissed the flood by concluding it had a negligible effect on the house, but again he could offer no explanation as to why sudden cracking would occur shortly after the flood, except to say the cracks were just not observed. (Appendix E, pp. A-101-3). Finally, any earth movement which may have occurred with the flood could be classified as a mudslide since the

Wests' house was located on an incline up the side of a hill and mud and sediment were found inside the house. (Appendix E, pp. A-70-73, 79-80) It is therefore very clear that there was sufficient evidence for the jury to infer that the flood waters were the immediate cause of the cracking damage to the house. And, even if earth movement was a contributing cause to the loss, the earth movement itself was immediately and concurrently caused by the flood waters. The structural damage would not have occurred except for the immediate and direct presence of the flood waters.

After hearing the evidence in both the West and Daigle Cases, the trial judge denied defendant insurer's motions for directed verdict and a judgment notwithstanding the verdict, stating:

"We conclude that there was sufficient evidence under *Boeing Co. v. Shipman*, supra, to go to the jury on both the issues of direct loss because of flood and damage substantial as a proximate result of flood." (Appendix G, pp. A-123, 128).

In denying defendant insurer's motion for a new trial in both cases, the trial court considered the Seventh Amendment precepts:

"This constitutional provision obviously cannot be applied so as to foreclose any scrutiny of a jury's fact findings; it expressed, however, in clear terms the principle that facts once found by a jury in the context of a civil trial are not to be re-weighed and a new trial granted lightly. The standard adopted by the Fifth Circuit is that the district court should

not grant a new trial motion unless the jury verdict is 'at least against the great weight of the evidence.' *Cities Service Oil Company v. Launey*, 403 F.2d 537 at 540 (5th Cir., 1968). A rule which would permit a court to grant a new trial when the evidence, the Fifth Circuit said, 'would destroy the role of the jury as the principal trier of the facts and would enable the trial judge to disregard the jury's verdict at will.' Applying the test enunciated in *Cities Service*, we must decline to grant a new trial." (Appendix G, pp. A-124, 128-9).

B. Issue: Flood Policy Interpretation

The Court of Appeals for the Fifth Circuit erred in its holding that any earth movement other than mudslide also excluded structural damage proximately caused by flood waters. That Court limits the causation of earth movement *only* to mudslide as well as defining earth movement as meaning soil settlement:

"In unambiguous terms," the Court said, "the policy provides that the defendant 'shall not be liable for loss . . . by . . . erosion, earthquake, landslide, or any other earth movement except such mudslides as are covered under the peril of flood . . .'. The policy does not cover loss caused by earth movement in the form of soil settlement. It unambiguously provides that the only earth movement covered is a mudslide caused or precipitated by accumulation of water on or under the ground." (*West*, p. 877, Appendix A, p. A-17).

This strained construction of a flood insurance policy was not the intent of Congress, the Secretary of Housing & Urban Development or the insured. *The intent of the "earth movement" policy exclusion was to exclude earthquake, landslide, and other like earth movement, all of which are similar in origin or causation, i.e., tectonic or volcanic. Earth movement which occurs independently in nature from flood is excluded, not earth movements and mudslides caused or precipitated by flood waters.* Earth movement as a policy exclusion is limited in its meaning to the same general kind and class of perils which immediately preceed it, under the common law doctrine of *ejusdem generis*. *Black's Law Dictionary*, (4th Ed, 1968, p. 608); *Gullett vs. St. Paul Fire & Marine Ins. Co.*, 446 F 2d 1100 (7th Cir., 1971); *Anderson vs. Indiana Lumbermens Mutual Ins. Co.*, 127 So2d 304 (La. App. 1961).

Nowhere in the policy, statute code of federal regulations and legislative history is there stated that structural damage proximately caused by general flooding condition is excluded. In the Code of Federal Regulations "Limitations on Coverage," 24 C.F.R. 1911.4(C), there is a statement that the policy does not cover damage from landslide or from earthquake or *similar earth movement* which are *volcanic or tectonic in origin*. (Appendix C, p. A-34) The regulations further state that the policy does not cover "losses caused by land slippage rather than mudslide" and then directs the reader to 24 C.F.R. 1909.1, (Appendix C, pp. A-34-5). There, under the definition of "mudslide" is found the limited contrasting statement that "a mudslide (i.e.) mudflow may occur as a distinct phenomenon while a landslide is in progress . . ." 24 C.F.R. 1909.1, (Appendix C, p. A-33). The only references to earth movement in the code

of federal regulations, The National Flood Insurance Act or legislative history of the Act is the limited classification of landslides and earthquakes which are volcanic in origin.

Nowhere in the flood policy, code of federal regulations and the Act is there any mention of an exclusion for soil settlement! *And there is certainly no reference to flood related soil settlement as an exclusion!* The Code of Federal Regulations reveals only that the policy does not cover erosion which is *not* flood related, 24 C.F.R. § 1909.1, (Appendix C, p. A-33), 24 C.F.R. § 1911.4 (C), (Appendix C, pp. A-34-5) Damage from the *pressure* or weight of ice and water is covered when the loss occurs as a part of flood, 24 C.F.R. § 1911.4(C), (Appendix C, p. A-34). Damage by hydrostatic pressure or seepage resulting from a general flooding condition was intended to be covered (See Perils Excluded, A-3, under the policy of flood insurance, Appendix F. p. A-108; and see 24 C.F.R. § 1911.4(C), Appendix C, p. A-34)

Congress declared that flood insurance coverage for residential properties was a priority, 42 USCA § 4012(a) (Appendix B, p. A-31). Protection from flood waters was the first purpose of the Act. (See 1968 *U.S. Code Cong. & Adm. News*, pp. 2966-7, 3026; Appendix I, pp. A-141-8). Flood insurance is now required on homes in flood prone areas when the home is built or improved with money borrowed from federally insured lending institutions 42 U.S.C.A. 4012a, Appendix B, pp. A-32a & b) Mudslide coverage was added by amendment in 1969 as an additional purpose. The additional protection provided by mudslide coverage was certainly not intended to limit the losses caused by flood waters! (See 1973 *U.S. Code Cong. & Adm. News*, pp.

3228-9, *infra.*). It is evident that mudslides are "... related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding ... the problems involved in providing protection against this damage and loss ... are similar to those ... caused by other forms of flooding ..." 42 USCA § 4001(f) (Appendix B, pp. A-29-30) Congress intended earth movement caused by flood to be covered as is seen in the legislative history of the National Flood Insurance Act below:

"DEFINITION OF 'FLOOD' "

Section 107 of the bill, which is identical with Section 108 of the House bill as reported, would amend the mudslide definition of Section 1370(b) of the National Flood Insurance Act of 1968 by making clear that losses or damage resulting from mudflows will be paid, regardless of whether there may already have been a landslide in progress that might affect the insured property.

The committee is aware of the difficulties the Federal Insurance Administration has encountered in differentiating mudslides, which the Act covers, from landslides, which are not covered. Because of those difficulties, and on the basis of extensive investigation and advice from technical experts on the subject, FIA has chosen to interpret the word mudslide to mean mudflow: namely, a condition where there is actually river, or flow, or "liquid mud" down a hillside, usually as a result of a dual condition of loss of brush cover and subsequent heavy rains. Such occurrences are unforeseeable, are less common than earth movement

from landslide or erosion, and generally have characteristics markedly similar to those of a flood. Clearly, the committee intended this condition to be covered when it added the mudslide amendment to the Act in 1969.

What had been unclear, however, is whether FIA had consistently provided mudflow coverage in situations where the mudslide was preceded or accompanied by a slow or gradual movement of the earth, sometimes caused or aggravated by the improper use of fill in the construction of new subdivisions which had already endangered the insured property, and would ultimately result in its destruction, whether or not a mudflow occurred. There have been indications that where a landslide was already in progress at the time the insured obtained coverage, FIA may refuse to pay the claim for a subsequent loss, even if a mudflow actually occurred.

The amendment added by the committee is intended to make clear that, just as FIA would be required to pay sudden flood loss that occurred to an insured property while a gradual landslide was in progress, so too it is expected to pay for mudflow losses that occur unexpectedly while a landslide is in progress, so long as the mudflow and not the landslide is the *proximate cause*, or sine qua non, without which the damage claimed would not have occurred..." 1973 U.S. Code Cong. & Adm. News, pp. 3228-9 (emphasis supplied).

Congress certainly intended coverage for the primary peril of flood waters as well as the added peril of mudslide, when the flood "... was preceded or accompanied by a slow movement of earth . . .," if the flood waters were the proximate cause of the damage.

In insurance cases the "proximate cause" of the loss is the efficient cause and not merely an incidental cause which may be nearer to the resulting damage. *Aetna Insurance Company vs. Boon*, 95 U.S. 117, 24 L.Ed 395 (1877); *Lanasa Fruit Steamship & Importing Co. vs. Universal Ins. Co.*, 302 U. S. 556, 58 S. Ct. 371, 82 L Ed 422 (1938); *Norwich Union Fire Ins. Soc. vs. Board of Commissioners*, 141 F 2d 600 (5th Cir., 1944); *Dubugue Fire and Marine Insurance Company vs. Caylor*, 249 F 2d 162 (10th Cir., 1957). When the flood water peril insured against is the proximate cause of the loss, as was determined by the jury, there should be recovery, notwithstanding the earth movement peril outside the policy which remotely and incidentally contributed to the loss. *Jackson vs. National Flood Insurers Assoc.*, 398 F. Supp. 1383 (S.D., Tex, 1974); *Cincotta vs. National Flood Insurers Assoc.*, No. 75-C-1833 (DC, NY, 1977, Unreported; reproduced as Appendix H, pp. A-135-40); 5 *Appleman, Insurance Law Practice* § 3083 (1970).

The Court of Appeals for the Fifth Circuit is obligated to construe the earth-movement-except-mudslides exclusion as the contracting parties would have expected it to be construed. The Court of Appeals for Fifth Circuit has stated that standard insurance law principals govern the construction and effect of flood insurance principles (*West*, supra, p. 881, Appendix A, p. A-20); *Drewett vs. Aetna Casualty & Surety Co.*, 539 F.2d 496 (5th Cir., 1976); *Summers vs.*

Harris, 573 F 2d 869 (5th Cir., 1978). With regard to policy exclusions, it is well established law that if such policy provisions are not clearly expressed, they will be construed strictly against the insurer and in favor of the insured. *Ashenbrenner vs. U. S. Fidelity & Guaranty Co.*, 292 U.S. 80, 54 S. Ct. 590, 78 L Ed 1137 (1934); *Hartford Steam Boil Inst. I. Co. vs. Schwartzman Pack. Co.*, 423 F.2d 1170 (10th Cir., 1970); *Calcasieu Marine Nat. Bank vs. Am. Emp. Ins.* 533 F 2d 290 (5th Cir., 1976); *Mason vs. National Flood Insurance Assoc.*, 361 F Supp 939 (D.C., Haw., 1973). An exclusion must be specific to be meaningful. If the drafters of the flood insurance policy intended the earth movement exclusion to include all earth movement, including earth movement caused by flood, they should have so said; the courts can not rewrite the contract. *Phoenix Ins. Co. vs. Slaughter*, 12 Wall 404, 20 L Ed 444 (1871); *Feeney and Meyers vs. Empire State Ins. Co.*, 228 F 2d 770 (10th Cir., 1955). If earth movement is intended to mean flood-related "earth settlement" or "earth sinking" the insurance policy is sufficiently ambiguous to be construed in favor of the insured, *Souza vs. Corvick*, 941 F 2d 1013 (10th Cir., 1970).

Finally, it is virtually impossible to conceive of a general flooding condition where there is not earth movement. Flood itself is defined in the policy as the partial or complete inundation of normally dry land areas, (Appendix F, p. A-108). Since earth movement accompanies or results from almost all flood waters, particularly when buildings are structurally damaged, almost all structural damage in flat land areas would be excluded as a loss caused by "earth movement other than a mudslide"! Under the United States Court of Appeals for the Fifth Circuit's decision

herein, the peril of mudslide would be covered, but the peril of earth movement caused by flood waters would not be covered. And, if the Federal Insurance Administration had difficulty in distinguishing mudslide from landslide, it would be impossible for the FIA to distinguish between a mudslide preceded or accompanied by earth movement caused by flood! Both perils, "mudslide" and "flood caused earth movement" would have similar characteristics in cause i.e., overflow of water and mud, and similar characteristics in effect, i.e., soil subsidence. The administrative and judicial resolution of this vicious circle would be arbitrary at best! Thus, the ruling of the Court of Appeals for the Fifth Circuit is unenforceable and it has been well settled that meaning and effect should be given to the whole contract; a construction which neutralizes any provision of a contract should never be adopted if the contract can be interpreted to give effect to all provisions. *Looney vs. Great American Ins. Co.*, 71 F.R.D. 211 (1976); 12 *Appleman, Insurance Law & Practice* § 7383 (1976); *Restatement of Contracts* § 236 (1932).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals of the Fifth Circuit.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

I certify that three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed to Mr. P. A. Bienvenu, 1414 American Bank Building, New Orleans, Louisiana, 70112, first class, postage prepaid, and three copies of this Petition have been mailed to the Solicitor General, Department of Justice, Washington, D.C., 20530, air mail, postage prepaid, all in accordance with Rule 33.

Houma, Louisiana, this 19th day of December, 1978.

LEOPOLD B. BABIN